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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CITY OF GRAND RAPIDS GENERAL
RETIREMENT SYSTEM AND CITY OF
GRAND RAPIDS POLICE & FIRE
RETIREMENT SYSTEM, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

BAYER AKTIENGESELLSCHAFT,
WERNER BAUMANN, WERNER
WENNING, LIAM CONDON, JOHANNES
DIETSCH, and WOLFGANG NICKL,

Defendants.

Case No. 3:20-cv-04737-RS

CLASS ACTION

**NOTICE OF MOTION AND MOTION
OF CITY OF GRAND RAPIDS
GENERAL RETIREMENT SYSTEM
AND CITY OF GRAND RAPIDS
POLICE & FIRE RETIREMENT
SYSTEM FOR APPOINTMENT AS
LEAD PLAINTIFF AND APPROVAL
OF THEIR SELECTION OF LEAD
COUNSEL; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: October 22, 2020

Time: 1:30 p.m.

Dept.: Courtroom 3, 17th Floor

Judge: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that at 1:30 p.m. on October 22, 2020, or on a date and at a time set by the Court, before the Honorable Richard Seeborg, at the United States District Court for the Northern District of California, located at the San Francisco Courthouse, 450 Golden Gate Avenue, Courtroom 3 – 17th Floor, San Francisco, California, City of Grand Rapids General Retirement System and City of Grand Rapids Police & Fire Retirement System (collectively, “Grand Rapids”) will respectfully move this Court for entry of an Order, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”): (1) appointing Grand Rapids as Lead Plaintiff in the above-captioned action; (2) approving Grand Rapids’ selection of Bernstein Litowitz Berger & Grossmann LLP (“Bernstein Litowitz”) to serve as Lead Counsel for the Class; and (3) granting any such further relief as the Court may deem just and proper.

This Motion is made on the grounds that Grand Rapids believes it is the “most adequate plaintiff” under the PSLRA and is therefore entitled to be appointed Lead Plaintiff. Specifically, Grand Rapids believes that it has the “largest financial interest” in the relief sought by the Class in this action by virtue of, among other things, its significant investments in the American Depositary Receipts (“ADRs”) of Bayer Aktiengesellschaft (“Bayer” or the “Company”). Grand Rapids also satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) because its claims are typical of other Class members’ claims and because it will fairly and adequately represent the interests of the Class.

This Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Jonathan D. Uslander filed herewith (the “Uslander Decl.”), the pleadings and other filings herein, and such other written or oral argument as may be permitted by the Court.

WHEREFORE, Grand Rapids respectfully requests that the Court: (1) appoint it as Lead Plaintiff in the above-captioned action pursuant to the PSLRA; (2) approve its selection of Bernstein Litowitz to serve as Lead Counsel for the Class; and (3) grant any such further relief as the Court may deem just and proper.

STATEMENT OF ISSUES

1. Whether Grand Rapids is the “most adequate plaintiff,” pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(i).

2. Whether to approve Grand Rapids’ selection of counsel, Bernstein Litowitz, pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

On July 15, 2020, Grand Rapids filed the first and only securities class action against Bayer and certain of its current and former senior executives (collectively, “Defendants”) alleging that Defendants violated Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b), 78t(a)), and U.S. Securities and Exchange Commission Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). Specifically, the action alleges that between May 23, 2016 and March 19, 2019, inclusive (the “Class Period”), Defendants misled investors concerning the Company’s acquisition of Monsanto Company (“Monsanto”) and the significant liability risk from lawsuits brought against Monsanto alleging that Monsanto’s flagship weed killer product, Roundup, caused non-Hodgkin’s lymphoma—a lethal blood cancer. Bayer ADR investors, including Grand Rapids, incurred significant losses after juries in the first two Roundup cancer cases to proceed to trial found that exposure to Roundup was a “substantial factor” in causing the plaintiffs’ non-Hodgkin’s lymphoma.

The PSLRA provides that the “most adequate plaintiff” is to serve as Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(i). Under the PSLRA, the most adequate plaintiff is the movant with the “largest financial interest” in the relief sought by the Class in this litigation and that also makes a *prima facie* showing that it is a typical and adequate Class representative under Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). For the reasons set forth below, Grand Rapids is the “most adequate plaintiff” by virtue of, among other things, the approximately \$751,000 in losses that it incurred

1 on its purchases of 101,580 Bayer ADRs during the Class Period.¹

2 In addition to asserting the largest financial interest, Grand Rapids readily satisfies the
3 relevant requirements of Rule 23 because its claims are typical of those of all members of the Class
4 and it will fairly and adequately represent the interests of the Class. Grand Rapids—which is
5 comprised of public pension funds that are overseen by a common Executive Director and
6 overlapping Trustees—is a paradigmatic Lead Plaintiff under the PSLRA because it is a
7 sophisticated institutional investor with a real financial interest in the litigation. Further, Grand
8 Rapids fully understands the Lead Plaintiff’s obligations to the Class under the PSLRA, and it is
9 willing and able to undertake those responsibilities to guarantee the vigorous prosecution of this
10 action. Moreover, Grand Rapids has already demonstrated its commitment and ability to
11 effectively prosecute this action, including through its filing of the first and only complaint
12 asserting these claims. Accordingly, Grand Rapids has both the incentive and ability to supervise
13 and monitor counsel.

14 Grand Rapids’ adequacy is also demonstrated through its selection of Bernstein Litowitz
15 to serve as Lead Counsel for the Class. Bernstein Litowitz is eminently qualified to prosecute this
16 case and has extensive experience in securities fraud litigation, which will benefit the Class.

17 Based on Grand Rapids’ financial interest in the outcome of this action, and its ability to
18 oversee counsel, Grand Rapids respectfully requests that the Court appoint it Lead Plaintiff and
19 otherwise grant its Motion.

20 **II. SUMMARY OF THE ACTION**

21 Bayer is a multinational pharmaceutical and life science company. On May 23, 2016, the
22 first day of the Class Period, Bayer announced that it had made an unsolicited all-cash offer to
23 acquire Monsanto—a U.S. based provider of agricultural chemicals and other products. On June
24 7, 2018, after a protracted regulatory approval process, the Company completed its acquisition of

25
26
27 ¹ Grand Rapids’ PSLRA-required Certifications are provided as Exhibit A to the Uslander Decl. In
28 addition, charts providing calculations of Grand Rapids’ losses are provided as Exhibit B to the
Uslander Decl.

1 Monsanto for \$63 billion in cash (the “Acquisition”)—the largest acquisition in German corporate
2 history—which Bayer financed, in large part, with newly assumed debt.

3 The action alleges that, throughout the Class Period, Defendants made false and misleading
4 statements concerning the Acquisition and the significant liability risk from lawsuits brought
5 against Monsanto alleging that Monsanto’s flagship weed killer, Roundup, caused cancer,
6 including non-Hodgkin’s lymphoma—a lethal blood cancer. Specifically, Defendants touted the
7 Acquisition as “a compelling transaction for shareholders” that would create “significant value”
8 by generating “stronger growth, better profitability, and a more resilient business profile” and “will
9 translate into attractive financial benefits for Bayer and its shareholders.” Defendants specifically
10 downplayed the liability risk related to Monsanto’s Roundup product, emphasizing that the
11 Company conducted a “thorough analysis” during its due diligence of Monsanto and “undertook
12 appropriate due diligence of litigation and regulatory issues throughout the process” which led
13 Bayer to finalize the Acquisition.

14 In truth, Defendants knew or recklessly disregarded that the Acquisition would not result
15 in the benefits for Bayer that Defendants had represented, due to Monsanto’s significant exposure
16 to liability risk related to Roundup. As a result of Defendants’ misrepresentations and omissions,
17 Bayer ADRs traded at artificially inflated prices throughout the Class Period.

18 The truth began to emerge on August 10, 2018, when a California state court jury in the
19 first Roundup cancer case to proceed to trial found unanimously that Roundup was a “substantial
20 factor” in causing the plaintiff to develop non-Hodgkin’s lymphoma and ordered Monsanto to pay
21 \$39 million in compensatory damages and \$250 million in punitive damages. As a result, the price
22 of Bayer ADRs declined over 11%, from \$26.59 per ADR to \$23.59 per ADR. However, despite
23 these disclosures, Bayer downplayed the significance of the jury verdict and continued to
24 misrepresent the prospects of the Acquisition.

25 On October 22, 2018, although the court in that case reduced the award of punitive damages
26 from \$250 million to \$39 million, the court otherwise denied Monsanto’s motion for a judgment
27 notwithstanding the verdict and Monsanto’s motion for a new trial, and upheld the jury’s verdict
28 that the plaintiff’s exposure to Roundup was a substantial factor in causing his non-Hodgkin’s

lymphoma. As a result, the price of Bayer ADRs declined nearly 9%, from \$22.00 per ADR to \$20.10 per ADR. However, Bayer continued to downplay the significance of these disclosures and misrepresent the prospects of the Acquisition.

Then, on March 19, 2019, a jury in the first federal Roundup cancer lawsuit against Monsanto to proceed to trial issued a verdict on causation in phase one of the bifurcated trial, finding that the plaintiff's "exposure to Roundup was a substantial factor in causing his non-Hodgkin's lymphoma." As a result, the price of Bayer ADRs declined over 9%, from \$19.67 per ADR to \$17.85 per ADR.

III. ARGUMENT

A. Grand Rapids Is The Most Adequate Plaintiff

Grand Rapids respectfully submits that it is entitled to be appointed Lead Plaintiff because it is the movant "most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA sets forth the procedure for selecting the Lead Plaintiff in class actions arising under the federal securities laws and provides a presumption in favor of the movant with the "largest financial interest" in the relief sought by the Class and satisfies the relevant requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *see also In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002) ("The [PSLRA] provides a simple . . . process for identifying the lead plaintiff pursuant to these criteria."). As set forth below, Grand Rapids believes it is the "most adequate plaintiff" and is entitled to be appointed as Lead Plaintiff.

1. Grand Rapids' Motion Is Timely

Under the PSLRA, any Class member may move for appointment as Lead Plaintiff within 60 days of the publication of notice that the first action asserting substantially the same claims has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). On July 15, 2020, Grand Rapids filed the above-captioned action in this District. That same day, counsel for Grand Rapids, Bernstein Litowitz, published a notice on *PR Newswire* alerting investors to the pendency of the action and informing them of the 60-day deadline to seek appointment as Lead Plaintiff, which is September 14, 2020. *See* ECF No. 7-1. Accordingly, Grand Rapids has timely moved for appointment as Lead Plaintiff through the filing of this Motion.

1 **2. Grand Rapids Has The Largest Financial Interest**

2 Grand Rapids should be appointed Lead Plaintiff because it has the largest financial interest
3 in the relief sought by the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). As demonstrated
4 herein, Grand Rapids suffered losses of approximately \$751,000 on its Class Period purchases of
5 101,580 Bayer ADRs. *See* Uslaner Decl., Exs. A-B. To the best of Grand Rapids’ knowledge,
6 there is no other applicant seeking Lead Plaintiff appointment that has a larger financial interest in
7 the litigation. Accordingly, Grand Rapids has the largest financial interest of any qualified movant
8 seeking Lead Plaintiff status and is the presumptive “most adequate plaintiff.” 15 U.S.C. § 78u-
9 4(a)(3)(B)(iii).

10 **3. Grand Rapids Otherwise Satisfies The Requirements Of Rule 23**

11 In addition to possessing the largest financial interest in the outcome of the litigation, Grand
12 Rapids otherwise satisfies the requirements of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc).
13 On a motion to serve as Lead Plaintiff, a movant “need only make a prima facie showing of its
14 typicality and adequacy.” *Hessefort v. Super Micro Comput., Inc.*, 317 F. Supp. 3d 1056, 1060-
15 61 (N.D. Cal. 2018). Here, Grand Rapids indisputably satisfies the typicality and adequacy
16 requirements.

17 Grand Rapids’ claims are typical of the claims of other purchasers of Bayer ADRs. “The
18 test of typicality is whether other members have the same or similar injury, whether the action is
19 based on conduct which is not unique to the named plaintiffs, and whether other class members
20 have been injured by the same course of conduct.” *Id.* at 1061 (citation omitted). Here, Grand
21 Rapids’ claims and the claims of all other Class members arise from the same course of conduct
22 and their legal arguments to prove Defendants’ liability are nearly identical. Indeed, like all other
23 Class members, Grand Rapids (1) purchased Bayer ADRs during the Class Period, (2) at prices
24 allegedly artificially inflated by Defendants’ materially false and misleading statements and/or
25 omissions, and (3) was damaged thereby. *See City of Dearborn Heights Act 345 Police & Fire*
26 *Ret. Sys. v. Align Tech., Inc.*, No. 12-cv-06039-LHK, 2013 WL 2368059, at *4 (N.D. Cal. May 29,
27 2013) (finding typicality requirement met when proposed Lead Plaintiff “purchased [defendant
28 corporation] common stock during the Class Period, allegedly in reliance upon Defendants’

1 purported false and misleading statements, and alleged[ly] suffered damages as a result”). As
2 such, Grand Rapids is a typical Class representative.

3 Grand Rapids similarly satisfies the adequacy requirement of Rule 23. Under Rule 23(a)(4)
4 of the Federal Rules of Civil Procedure, the representative party must “fairly and adequately
5 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “The test for adequacy is whether the
6 class representative and his counsel ‘have any conflicts of interest with other class members’ and
7 whether the class representative and his counsel will ‘prosecute the action vigorously on behalf of
8 the class.’” *Super Micro Comput.*, 317 F. Supp. 3d at 1061. Grand Rapids satisfies these elements
9 because its substantial financial stake in the litigation provides the incentive to vigorously
10 represent the Class’ claims. Grand Rapids’ interests are perfectly aligned with those of the other
11 Class members and are not antagonistic in any way. There are no facts to suggest any actual or
12 potential conflict of interest or other antagonism between Grand Rapids and other Class members.

13 Moreover, Grand Rapids—which includes sophisticated institutional investors collectively
14 responsible for overseeing hundreds of millions of dollars in assets—is exactly the type of investor
15 that Congress encouraged, through the enactment of the PSLRA, to lead securities class actions.
16 *See Shenwick v. Twitter, Inc.*, No. 16-cv-05314-JST, 2016 WL 10672428, at *2 (N.D. Cal. Dec. 22,
17 2016) (“Congress intended that the lead plaintiff provision would encourage institutional investors
18 to take a more active role in securities class action lawsuits[.]”) (internal quotations omitted); H.R.
19 Conf. Rep. No. 104-369, at *34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (explaining that
20 “increasing the role of institutional investors in class actions will ultimately benefit shareholders
21 and assist courts by improving the quality of representation in securities class actions”).

22 Finally, Grand Rapids has demonstrated its adequacy through its selection of Bernstein
23 Litowitz as Lead Counsel to represent the Class in this action. As discussed more fully below,
24 Bernstein Litowitz is highly qualified and experienced in the area of securities class action
25 litigation and has repeatedly demonstrated an ability to conduct complex securities class action
26 litigation effectively. Thus, as demonstrated herein, Grand Rapids satisfies the requirements of
27 Rule 23.

B. Grand Rapids Selected Well-Qualified Lead Counsel To Represent The Class

Pursuant to the PSLRA, a movant shall, subject to court approval, select and retain counsel to represent the class it seeks to represent, and that selection is to be honored unless it is necessary to “protect the interests of the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa); *see also Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 712 (9th Cir. 2009) (“[I]f the lead plaintiff has made a reasonable choice of counsel, the district court should generally defer to that choice.”).

Bernstein Litowitz is among the preeminent securities class action law firms in the country. *See Uslander Decl., Ex. C* (Bernstein Litowitz’s Firm Résumé). Bernstein Litowitz served as Lead Counsel in *In re WorldCom, Inc. Securities Litigation*, No. 02-cv-03288 (S.D.N.Y.), in which settlements totaling in excess of \$6 billion—one of the largest recoveries in securities class action history—were obtained for the class. Bernstein Litowitz also secured a resolution of \$2.43 billion for the class in *In re Bank of America Corp. Securities, Derivative & ERISA Litigation*, No. 09-md-2058 (S.D.N.Y.), a \$1.06 billion recovery for the class in *In re Merck & Co., Inc. Securities, Derivative & “ERISA” Litigation*, No. 05-cv-1151 (D.N.J.), and a \$730 million settlement on behalf of the class in *In re Citigroup Inc. Bond Litigation*, No. 08-cv-9522 (S.D.N.Y.).

Significant examples in which courts in this District, including this Court, have recognized Bernstein Litowitz as adequate and qualified class counsel in securities class actions include: *In re McKesson HBOC, Inc. Securities Litigation*, No. 99-cv-20743 (N.D. Cal.) (recovering \$1.05 billion for investors, the largest recovery ever in a securities class action in this District); *Hefler v. Wells Fargo & Company*, No. 16-cv-5479 (N.D. Cal.) (recovering \$480 million for investors); *In re 3Com Corp. Securities Litigation*, No. 97-cv-21083 (N.D. Cal.) (recovering \$259 million for investors); *In re Maxim Integrated Products, Inc. Securities Litigation*, No. 08-cv-0832 (N.D. Cal.) (recovering \$173 million for investors); *In re Wells Fargo Mortgage-Backed Certificates Litigation*, No. 09-cv-1376 (N.D. Cal.) (recovering \$125 million for investors); *In re SunPower Securities Litigation*, No. 09-cv-5473 (N.D. Cal.) (recovering \$19.7 million for investors) (Seeborg, J.); and *In re Clarent Corp. Securities Litigation*, No. 01-cv-3361-CRB (N.D. Cal.) (conducting a four-week trial and obtaining a favorable jury verdict finding the CEO and former auditor of the defendant company liable, leading to a recovery of millions of dollars for investors).

1 Thus, the Court may be assured that by granting this Motion, the Class will receive the
2 highest caliber of legal representation.

3 **CONCLUSION**

4 For the reasons discussed above, Grand Rapids respectfully requests that the Court appoint
5 it as Lead Plaintiff, approve its selection of Bernstein Litowitz as Lead Counsel for the Class, and
6 grant any such further relief as the Court may deem just and proper.

7 Dated: September 14, 2020

Respectfully submitted,

8 **BERNSTEIN LITOWITZ BERGER**
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Proposed Lead Counsel for the Class

21 **Pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

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